Supreme Court, U. S.
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In the

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO. 75-1101

HAROLD MELNICK AND DAVID SHRIRO,
Petitioners

vs.

A. J. McCLELLAN,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondent, A. J. McClellan, prays that a Writ of Certiorari not be issued to review the Judgment of the Court of Appeals for the Tenth Circuit.

OPINION BELOW

See Petitioners' Petition for a Writ of Certiorari.

JURISDICTION

See Petitioners' Petition for a Writ of Certiorari.

QUESTIONS PRESENTED

See Petitioners' Petition for a Writ of Certiorari.

STATUTES AND RULES INVOLVED

See Petitioners' Petition for a Writ of Certiorari.

Rules of The Supreme Court of the United States,

Rule 19. Considerations Governing Review on Certiorari.

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law: or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a

departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

STATEMENT OF THE CASE

The Respondent accepts the Statement of the Case made by Petitioners in the Petition for a Writ of Certiorari; however, it should be noted that jurisdiction of the court of first instance was based upon diversity of citizenship, 29 U.S.C.A. 1332.

ARGUMENT

It is respectfully contended that the subject matter and the questions presented in Petitioners' Petition for a Writ of Certiorari do not present an issue subject to review by a Writ of Certiorari. The parties entered into a number of agreements for the purpose of constructing an apartment complex in Albuquerque, New Mexico. (R. 84-193). To accomplish that purpose, Petitioners and Respondent formed a joint venture known as MSM Properties. (R. 61, 90-105). The joint venture became the general partner of a limited partnership known as Lafayette Square Apartments, Ltd. (R. 61, 106-126). Lafayette Square Apartments, Ltd. entered into a variety of agreements including a

Construction Contract with Melnick-Shriro Company, Inc., a construction company owned exclusively by Petitioners. (R. 61-62, 144-147). The Construction Contract provided that Melnick-Shriro, Inc. would construct the apartment complex for a fixed price. (R. 145). When construction was completed, it was discovered that construction costs exceeded the fixed price and there was a construction cost overrun. (R.62). Petitioners caused funds earmarked for distribution to the joint venture to be used to pay the construction cost overrun of the Melnick-Shriro Company, Inc. (R. 63). The funds earmarked for distribution to the joint venture consisted of a $290,000.00 contribution to the limited partnership by Michael Coit, the limited partner.

Respondent contended that Petitioners had misappropriated $239,000.00 of the Coit contribution and filed suit in United States District Court for the District of New Mexico. (R.6). He contended that the intent of the parties, as evidenced by the various documents, was for the Coit contribution to be equally divided between the three joint venturers of MSM Properties and that it could not be used in any other manner. He also contended that there were three separate legal entities involved in the transaction, to-wit: MSM Properties, Lafayette Square Apartments, Ltd., and Melnick-Shriro Company, Inc. — the joint venture, the limited partnership, and the construction company, respectively. The United States District Court for the District of New Mexico held that the three businesses were separate legal entities; that the intent of the parties was to distribute the Coit

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contribution equally among the three joint venturers, and that the Coit contribution could not be used to offset construction cost overruns of the Melnick-Shriro Company. (R. 66-71). The decision was affirmed by the United States Court of Appeals for the Tenth Circuit.

It is respectfully contended that the Judgment of the United States District Court for the District of New Mexico is supported by substantial evidence and should not be reversed on appeal. *Besser Manufacturing Company v. United States,* 343 U.S. 444, 96 L.Ed 1063, 72 S.Ct. 838 (1952). Petitioners' Argument in their Petition for a Writ of Certiorari is that the separate legal identity of the joint venture, the limited partnership, and the corporation should be ignored and this Court should hold that the intent of the parties was to equally share all profits and losses of any of the legal entities. Petitioners point to various federal statutes and rules promulgated by the Secretary of Housing and Urban Development which place certain restrictions on mortgage financing where there is an "identity of interest" between the mortgagor and the contractor as support for the theory that this Court should ignore the separate legal status of MSM Properties, Lafayette Square Apartments, Ltd., and Melnick-Shriro Company, Inc. and hold that they are all one entity and that the profits of MSM Properties should be used to offset the construction cost overruns of Melnick-Shriro Company, Inc. It is respectfully contended that Petitioners are only presenting a question of fact to this Court which was decided against them by the lower courts. It is respectfully contended that the decisions of

the lower courts are supported by substantial evidence and cannot be reversed on appeal in the absence of glaring error. *Besser Manufacturing Co. v. United States,* 343 U.S. 444, 96 L.Ed. 1063, 72 S.Ct. 838 (1952).

It is also respectfully contended that the issues presented by Petitioners are not subject to review by this Court by means of a Writ of Certiorari. Petitioners' Petition for a Writ of Certiorari does not assert any of the reasons for review set forth in Rule 19 of the Rules of the Supreme Court of the United States. This is not a situation where a state court has decided a federal question of substance not heretofore determined by this Court; and it is not a situation where the Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter, or has decided an important state or territorial question in a way in conflict with applicable state or territorial law, or has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court, or has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The only question presented by Petitioners' Petition for a Writ of Certiorari is whether the lower court properly determined the intent of all parties in entering into various agreements and viewed all agreements together to ascertain that intent. It has long been held that jurisdiction to review by certiorari should be sparingly exercised, and should only be granted in cases of particular

gravity and general importance, or in cases affecting relations with foreign governments, or to secure uniformity of decisions. *Lau Ow Bew,* 141 U.S. 583, 35 L.Ed. 868, 12 S.Ct. 43 (1891).

For the foregoing reasons, it is respectfully contended that certiorari should not be granted in this case.

POINT ONE

SHOULD THE CORPORATE FORM BE IGNORED, WHERE EQUAL PARTNERS DEAL WITH THE ENTITY IN A MANNER BENEFITTING ALL EQUALLY.

Petitioners argue in their Petition for a Writ of Certiorari that this Court should ignore the clear language of the various contracts and agreements which form three separate legal entities, to-wit: MSM Properties, a joint venture, Lafayette Square Apartments, Ltd., a limited partnership, and Melnick-Shriro Company, Inc., a corporate general contractor. The primary issue proposed to the Court by Petitioners is that the profits of one of those legal entities should be used to offset the losses of the other-specifically that the profits of MSM Properties should be used to offset the construction cost overruns of Melnick-Shriro Company, Inc. By so doing, Petitioners are ignoring the clear intent of the parties in entering into the various agreements and the separate legal identity of each of the entities. *Bank of New Mexico v. Rice,* 78 N.M. 170, 429 P.2d 368 (1967); and *Shillinglaw v. Owen Shillinglaw Fuel Co.,* 70 N.M. 65, 370 P.2d 502

(1962). MSM Properties is a joint venture comprised of the three parties to this action. (R. 90-105, 61). Lafayette Square Apartments, Ltd. is a limited partnership comprised of MSM Properties and American 236 Housing Corporation as general partners and Michael Coit as a limited partner (R.61, 106-126). Melnick-Shriro Company, Inc. is a corporated general contractor and its only shareholders are Petitioners, Harold Melnick and David Shriro. (R.61). As the Court of Appeals stated:

> And, like the trial court, we think the key to this entire matter is the fact that the joint venture (MSM) is a business entity which is not the same as, and on the contrary is different and distinct from, the Melnick-Shriro Company. Furthermore, Melnick-Shriro Company, the corporation is a separate entity from its stockholders, and this is true even though Melnick and Shriro, as individuals, own all the stock of the corporation. (Petition for Writ of Certiorari, Page A-5).

Petitioners cite several legal authorities for the proposition that the various documents including the Joint Venture Agreement and the Limited Partnership agreement as well as the loan closing documents form a part of a single transaction and should be contrued together. (Petition for Writ of Certiorari P. 10). We agree that the documents should be construed together; however, the mere fact that they are construed together does not mean that the intent of the parties in entering into the documents, as clearly shown by the language of

the documents, or the separate legal identity of the various entities that are parties to those documents must be ignored. The Limited Partnership Agreement very clearly provides that the contribution of $290,000.00 to Lafayette Square Apartments, Ltd. by Michael Coit, the limited partner, is to be withdrawn by MSM Properties, the joint venture. (R.111). The Joint Venture Agreement then provides that all profits of the joint venture shall be distributed equally among the joint venturers. (R.92). The Construction Contract between Lafayette Square Apartments, Ltd. and Melnick-Shriro Company, Inc. provides that the latter is to construct the project for a fixed price of $2,006,840.00 plus certain other fees, taxes and mortgage insurance premiums. (R.145). If the Melnick-Shriro Company had completed the project for less than the fixed price, it would have made a profit which could have been distributed to its stockholders and it is inconceivable that MSM Properties would have had any claim to that profit for distribution to its member joint venturers.

Petitioners also allege that the various agreements entered into by the parties should be read to determine the intent of the parties and if the language of the agreements lead to an unreasonable result that the Court should look elsewhere to determine the intent of the parties. (Petition for Writ of Certiorari PP. 12-13). Again, it is admitted that this is the law; however, it is respectfully contended that a reading of the agreements clearly shows that the intent of the parties was to distribute the $290,000.00 Coit contribution among the three members of the joint venture. In furtherance of this, the first

installment of the Coit contribution in the amount of $51,000.00 was distributed among the members of the joint venture. (R.63 and Petition for Writ of Certiorari P. 11). Also, the case was submitted to the District Court on stipulated facts and neither party claimed that any of the agreements were ambiguous or meant anything other than what they said. (R.59-65).

The corporate form should not be ignored in this case and the profits of MSM Properties should not be used to offset the construction cost overruns of Melnick-Shriro Company, Inc.

POINT TWO

THE FEDERAL STATUTES AND RULES PROMULGATED BY THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT THEREUNDER WHICH ESTABLISH AN IDENTITY OF INTEREST BETWEEN THE PARTIES AND THE CONTRACTOR IS DEEMED TO HAVE BEEN CONTEMPLATED BY THE PARTIES IN THE EXECUTION OF THE CONTRACT DOCUMENTS, WHICH CANNOT THEN BE CONSTRUED AS BEING AMONG SEPARATE ENTITIES.

Petitioners in this point urge this Court to adopt the proposition that because there is a statute (12 U.S.C.A. §1715r(c)), and various rules and regulations of the Secretary of Housing and Urban Development (24 C.F.R. §221.550a) providing that where there is an identity of interest between the builder and the mortgagor that a builder's and sponsor's profit and risk allowance will be allowed in lieu of a builder's fee that the separate legal identity of MSM Properties,

Lafayette Square Apartments, Ltd., and Melnick-Shriro Comopany, Inc. should be ignored and the profits of MSM Properties used to offset the construction cost overruns of Melnick-Shriro Company, Inc. Petitioners state:

> There is, therefore, a statute, administrative rule and administrative recognition of the identity of interest which conclusively shows that the Contractor and the parties to this suit were, contrary to the holding of the lower Court, the same. (Petition for Writ of Certiorari P. 17).

It is respectfully contended that the phrase "identity of interest" does not necessarily mean that the parties are the "same". For example, the FHA Agreement and Certification in Paragraph 5 inquires about the "identity of interest" between the mortgagor, the architect, the general contractor, and any other subcontractors, suppliers or equipment lessors. (R.142). In answer to that question, Lafayette Square Apartments, Ltd. states that:

> None except: Harold Melnick and David S. Shriro, Sponsors, are officers and principal shareholders of the General Contractor, Melnick-Shriro Company, Inc., and A. J. McClellan, Sponsor, is superintendent of General Contractor. The General Contractor, Melnick-Shriro Company, Inc., performed certain services for the Architect, Greener and Sumner, Architects, Inc., and will receive a fee therefor. (R.142).

The very answer to this question indicates that

"identity of interest" does not mean that the parties are the same and the parties did not so intend at the time the Agreement and Certification was executed. For example, there is an identity of interest, as noted, between the Melnick-Shriro Company and the architect; however, they are not the same and it does not appear from the record that the Melnick-Shriro Company had any ownership interest in the architect. Likewise Lafayette Square Apartments, Ltd. had an identity of interest with the Melnick-Shriro Company but they are not the same legal entity. Therefore, it is respectfully contended that the purpose of the statutes and regulations relative to an "identity of interest" between the mortgagor, the architect, the general contractor, and the other parties to an FHA financed housing project is to prevent collusion and unfair profits from being obtained at the expense of FHA, rather than to hold that the parties are all identical and must equally share all profits and losses as alleged by Petitioners.

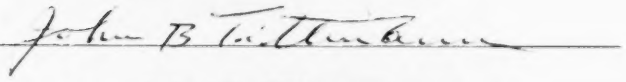
CONCLUSION

In conclusion, it is respectfully contended that this is not a proper case for the granting of a Writ of Certiorari. The Petitioners are merely asking this Court to interpret the various agreements between them in a manner different than the way in which they were interpreted by the District Court and the Court of Appeals. The decisions of the lower courts are supported by substantial evidence and this Court should not substitute its judgment for theirs. The Petitioners are asking this Court to disregard the clear

language of the Agreements and status of the various parties to the Agreements as separate legal entities and hold that MSM Properties, Lafayette Square Apartments, Ltd., and Melnick-Shriro Company, Inc., are all the same legal entity and that the profits and losses of each should be shared equally. This is contrary to the intent of the parties and the clear language of the various Agreements. It is respectfully requested that this Court deny Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

KELEHER & McLEOD

By 

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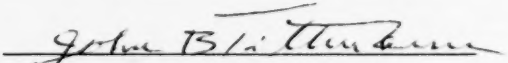
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed to Owen B. Marron, 406 Sandia Savings Building, Albuquerque, New Mexico 87102 and to Jay M. Goltz, 7007 Preston Road, Suite 326, Dallas, Texas 75205, Attorneys for Petitioners, by first class mail postage prepaid this 3rd day of March, 1976, and that they are the only parties required to be served.



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